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No. 86-375

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

THE WHITE MOUNTAIN APACHE TRIBE, PETITIONER

v.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below correctly rejected the attempt by petitioner White Mountain Apache Tribe to prevent the Attorney General and other Executive Branch officials from preparing and submitting on behalf of the United States, as a party to a general stream adjudication in state court, claims to reserved water rights owned by the United States in trust for petitioner.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Arizona v. *California*, 460 U.S. 605	3, 7
Arizona v. *San Carlos Apache Tribe*, 463 U.S. 545	3, 5, 6, 8, 9, 10
Block v. *North Dakota*, 461 U.S. 273	9
Colorado River Water Conservation Dist. v. *United States*, 424 U.S. 800	2, 9, 10
Confiscation Cases, 74 U.S. (7 Wall.) 454	10
Heckler v. *Chaney*, 470 U.S. 821	10
Heckman v. *United States*, 224 U.S. 413	9
Nevada v. *United States*, 463 U.S. 110	7, 9, 10
Northern Cheyenne Tribe v. *Adsit*, 721 F.2d 1187	4, 10
Ponzi v. *Fessenden*, 258 U.S. 254	10
Swift & Co. v. *United States*, 276 U.S. 311	10
United States v. *Dann*, 470 U.S. 39	6
United States v. *San Jacinto Tin Co.*, 125 U.S. 273	10
United States v. *Superior Court in and for Maricopa County*, 144 Ariz. 265, 697 P.2d 658	6-7
United States v. *White Mountain Apache Tribe*, 604 F. Supp. 464, aff'd, 784 F.2d 917	3, 5, 9
White Mountain Apache Tribe v. *Smith*, No. 81-1205 (D.D.C. June 23, 1981), aff'd, 675 F.2d 1341, cert. denied, 463 U.S. 1228	4

Statutes and rule:

Indian Claims Commission Act, ch. 959, 60 Stat. 1049, 25 U.S.C. (1976 ed.) 70 *et seq.*	6

Statutes and rule—Continued: Page

McCarran Amendment, 43 U.S.C. 666 ..... 2, 5, 6, 9, 10
Quiet Title Act, 28 U.S.C. 2409a(f) 6
5 U.S.C. 701(a)(2) 10
5 U.S.C. (& Supp. II) 702(2) 9
28 U.S.C. 516 9
28 U.S.C. 519 9
Fed. R. Civ. P. 54(b) 6, 7

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1c-10c) is reported at 784 F.2d 921, and the opinion of the district court (Pet. App. 1a-11a) is reported at 604 F. Supp. 185.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 1986, and the petition for rehearing was denied on June 3, 1986 (Pet. App. 1d). The petition for a writ of certiorari was filed on September 2, 1986, the day following Labor Day, a federal legal

holiday. See Sup. Ct. R. 29.1. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns claims to water for the Fort Apache Indian Reservation in Arizona, which is the home of petitioner White Mountain Apache Tribe.

1. The United States has been joined as a defendant in proceedings initiated in the Superior Court for Maricopa County, Arizona, for the determination of all rights to water in the Gila River system. *In re the General Adjudication of All Rights to Use Water in the Gila River Systems and Sources*, W-1 through W-4 (consolidated) (hereinafter cited as *W-1*). The United States was made a party to the state court proceedings pursuant to the McCarran Amendment, 43 U.S.C. 666, in which Congress has given its consent "to join the United States as a defendant in any suit * * * for the adjudication of rights to the use of water of a river system or other source * * * where it appears that the United States is the owner of * * * water rights * * * and the United States is a necessary party to such suit." In *W-1*, the superior court will adjudicate the water rights of private claimants as well as the various water rights of the United States, including rights reserved and held by the United States in trust for Indian Tribes. The Fort Apache Indian Reservation is one of the Reservations for which the United States must, as trustee, submit water-right claims in *W-1*.

2. In *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 809-813 (1976), this Court held that the McCarran Amendment grants the necessary consent to join the United States as a defendant in a general stream adjudication in state

court even with respect to reserved water rights owned by the United States in trust for Indians. And in *Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545 (1983), the Court specifically held that the United States District Court in Arizona had properly deferred to state court proceedings in *W-1* for the adjudication of Indian water rights. Petitioner nevertheless has strenuously objected to the United States' submission to the superior court in *W-1* of water-right claims for the Fort Apache Reservation. To date, petitioner likewise has declined to intervene in *W-1* in order to present water-right claims on its own behalf, as the state courts have indicated it may do (Pet. App. 7c). See *Arizona* v. *California*, 460 U.S. 605, 613-615 (1983). Instead, the Tribe has sought to prevent the United States from participating. See Pet. App. 4c-5c; see also *United States* v. *White Mountain Apache Tribe*, 784 F.2d 917 (9th Cir. 1986).

a. Petitioner's first such effort was by way of a suit in the United States District Court for the District of Columbia seeking an injunction barring the Federal Government from filing a claim for the Fort Apache Reservation in *W-1*. There, as here, the Tribe alleged that *W-1* was not a proper McCarran Amendment proceeding and that the Attorney General would, unless restrained, appear and submit the Tribe's water rights for adjudication in *W-1* notwithstanding the state court's asserted lack of jurisdiction. In addition, the Tribe alleged that the Attorney General and the Secretary of the Interior were incapable of adequately representing the Tribe in *W-1* due to "all pervasive" conflicts of interest arising from their simultaneous duty to represent the United States with respect to its own water rights. There, as

in this case, the Tribe specifically relied upon the United States' alleged mismanagement of the Tribe's natural resources in favor of the Salt River Reclamation Project as the crux of the supposed conflict of interest and inability fairly to represent the Tribe's water interests in *W-1*. See Complaint at paras. III, XIII, XVI n.2, *White Mountain Apache Tribe* v. *Smith*, No. 81-1205 (D.D.C. June 23, 1981). The district court dismissed that case, finding that it lacked jurisdiction "over the Attorney General's exercise of litigating judgment" and that the Tribe had "an adequate remedy at law in [the *W-1* proceeding] subject, as it is, to potential appellate review in the United States Supreme Court." The Court of Appeals for the District of Columbia Circuit affirmed (675 F.2d 1341 (1982)), and this Court denied certiorari (463 U.S. 1228 (1983)).

b. After petitioner failed in the District of Columbia litigation, petitioner initiated an action in its own tribal court to achieve essentially the same result. On December 23, 1981, the tribal court issued a temporary restraining order prohibiting four employees of the Department of the Interior from transferring any materials or documentation to the Department of Justice for use in *W-1*. The United States then brought an action in the United States District Court for the District of Arizona seeking an injunction barring petitioner from interfering, through its tribal court or otherwise, with the performance by officers of the United States of their official duties in connection with *W-1*. The district court granted a permanent injunction to that effect after this Court's decision in *San Carlos Apache Tribe* and the Ninth Circuit's decision on remand in *Northern Cheyenne Tribe* v. *Adsit*, 721 F.2d 1187 (1983), made clear that the

state court adjudication in *W-1* should proceed. *United States* v. *White Mountian Apache Tribe*, 604 F. Supp. 464 (D. Ariz. 1985). The court of appeals affirmed in an opinion rendered on the same date that it rendered the opinion and judgment in the instant case (see *United States* v. *White Mountain Apache Tribe*, 784 F.2d 917 (1986)), but the Tribe has not sought review of that decision.[1]

3. In the instant action, which was filed in the United States District Court for the District of Arizona in 1983, petitioner sought: (i) a declaration that, due to an alleged conflict of interest, the government had mismanaged petitioner's water resources in order to increase the amount of water available for the Salt River Reclamation Project; (ii) a declaration that the alleged conflict of interest disabled the United States from adequately representing petitioner's interests in any water adjudication; (iii) a declaration that the Arizona courts lack jurisdiction in *W-1* to determine reserved water rights held in trust for petitioner; (iv) an injunction barring respondents from taking any further action in *W-1* to represent the United States in its capacity as trustee with respect to those rights; and (v) a declaration quieting title to 14,000 acres that were excluded from the Reservation by an allegedly erroneous survey in 1887 (Pet. App. 5c). The district court dismissed with prejudice all of these claims except the one based on

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[1] Petitioner, although not a party, also filed a motion in this Court after argument in *San Carlos Apache Tribe*, urging the Court to "dismiss" the state adjudication in *W-1* on the ground that *W-1* is not a general stream adjudication for purposes of the McCarran Amendment. The Court denied the motion, but, treating it as a motion for leave to file a brief amicus curiae, permitted the filing. 463 U.S. at 571-572 n.22.

mismanagement (Pet. App. 1a-10a), and it entered a judgment to that effect under Fed. R. Civ. P. 54(b) (Pet. App. 1b-2b).[2]

The court of appeals affirmed (Pet. App. 1c-10c), observing that this suit "is really another collateral attack on the government's participation in *W-1*" (*id.* at 4c-5c). The court of appeals rejected petitioner's challenge to the superior court's jurisdiction in *W-1*, explaining that Congress has conferred jurisdiction over such suits in the McCarran Amendment; that *San Carlos Apache Tribe* confirmed that jurisdiction specifically with reference to *W-1*; and that the Arizona Supreme Court had rejected other challenges to the superior court's jurisdiction in *United States* v. *Superior Court in and for Maricopa County,*

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[2] The district court held that petitioner's claim regarding the 14,000 acres excluded by the 1887 survey was barred by a stipulated final judgment entered in 1972 in an action brought by petitioner pursuant to the Indian Claims Commission Act, ch. 959, 60 Stat. 1049, 25 U.S.C. (1976 ed.) 70 *et seq.* Pet. App. 2a-7a. Compare *United States* v. *Dann*, 470 U.S. 39 (1985). The court of appeals affirmed that holding (Pet. App. 9c-10c), concluding as well that petitioner's claim is barred by the 12-year statute of limitations in the Quiet Title Act, 28 U.S.C. 2409a(f) (Pet. App. 10c n.5). Petitioner does not appear to raise the excluded-land issue in its petition for a writ of certiorari.

We have been informed that on November 3, 1986, the district court dismissed petitioner's mismanagement claim without prejudice, holding that petitioner must first exhaust its administrative remedies within the Department of the Interior. The Tribe also has a claim for money damages, originally filed with the Indian Claims Commission but now pending before the United States Claims Court, based on alleged mismanagement of petitioner's natural resources in the past. See Pet. App. 4a; *White Mountain Apache Tribe* v. *United States*, Cl. Ct. Docket 22H. The trial in that case was recently completed, but no decision has yet been rendered.

144 Ariz. 265, 697 P.2d 658 (1985). See Pet. App. 6c. In addition, relying on *Nevada* v. *United States*, 463 U.S. 110, 128, 140-142 (1983), and *Arizona* v. *California*, 460 U.S. at 627-628, the court of appeals rejected petitioner's contention that the United States has an irreconcilable conflict of interest that disables it from presenting claims for the Fort Apache Reservation in *W-1* (Pet. App. 7c-9c). The court found it difficult to understand in this regard how petitioner's interests could be protected by preventing *any* claim for water for the Reservation from being advanced in *W-1*, because petitioner might entirely lose its water rights as a result. Accordingly, the court concluded that if petitioner believes that the United States has understated the claim for the Reservation, petitioner's remedy is to intervene in *W-1* and seek a more substantial award. *Id.* at 6c-7c, 8c-9c.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. In fact, as the court below observed, petitioner's arguments are so plainly foreclosed that its continuing efforts to prevent the United States from participating in *W-1* have "become an exercise in futility" (Pet. App. 2c). Review by this Court clearly is not warranted.

1. Petitioner's contention (Pet. 8, 10, 15) that the decision of the court of appeals deprives it of the opportunity to prove its claim regarding mismanagement of the Reservation's forest and other natural resources, except in an action for money damages (see note 2, *supra*), is spurious. Petitioner's claim for declaratory and injunctive relief based on mismanagement was *excluded* from the Rule 54(b) par-

tial judgment that was affirmed by the court of appeals and is now before this Court.[3] Moreover, to the extent that petitioner's allegations of mismanagement have a bearing on the amount of water that it believes should be claimed for the Fort Apache Reservation (see Pet. 3-8), petitioner may intervene in *W-1* and seek to prove whatever water rights it wishes to advance in its own behalf. Petitioner also would be free to argue in *W-1* that those rights should not be diminished by any reduction of demand for water that is attributable to improper management practices in the past that affected its resources (Pet. App. 7c). It is in this manner that petitioner would receive the "best assurance that its interest will be protected" (*id.* at 8c), and, as this Court observed, petitioner's right to reject that course is of "dubious" value. *San Carlos Apache Tribe*, 463 U.S. at 566 n.17.

2. Petitioner is equally mistaken in its objections (Pet. 14-19) to the court of appeals' conclusion that this action against the individual federal respondents must be regarded as "one taken against the United States itself" (Pet. App. 5c n.2). This suit was unquestionably brought to frustrate the United States' participation as a party in *W-1* with respect to water rights for the Fort Apache Reservation, to which the United States holds legal title (*id.* at 4c-5c, 6c). Those rights may be adjudicated in the state superior

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[3] As petitioner elsewhere appears to acknowledge (see Pet. 12-13), the aspect of the case now before the Court concerns only the government's presentation of claims in *W-1*. The district court still has not resolved the merits of petitioner's mismanagement claim, which was recently dismissed without prejudice on the ground that petitioner must first exhaust its administrative remedies. See note 2, *supra*.

court only because Congress, in the McCarran Amendment, waived the sovereign immunity of the United States. See *Colorado River*, 424 U.S. at 809-813; *San Carlos Apache Tribe*, 463 U.S. at 566 n.17; *Nevada* v. *United States*, 463 U.S. at 128, 142. The United States' appearance as a party in *W-1*, and its representation of petitioner's interests to that extent, do not "depend on the [petitioner's] acquiescence." *Heckman* v. *United States*, 224 U.S. 413, 445 (1912). See also Pet. App. 8c; *United States* v. *White Mountain Apache Tribe*, 784 F.2d at 920. Petitioner's attempt in this litigation to prevent respondents from representing (and assisting in representing) the United States in *W-1*—conduct that is manifestly within the scope of their official duties (see, *e.g.*, 28 U.S.C. 516, 519)—renders this in substance a suit against the United States.

For these reasons, if petitioner fears that the United States, through respondents, will not adequately protect its interests, petitioner's recourse must be to advance its *own* claims in *W-1*, independently of the United States (Pet. App. 7c-9c). It is in the McCarran Amendment that Congress has waived the United States' immunity to suit in such matters, and the availability of a McCarran Amendment forum for the presentation of petitioner's objections to the claims advanced by the United States in *W-1* necessarily precludes review in this independent action. Cf. 5 U.S.C. (& Supp. II) 702(2); *Block* v. *North Dakota*, 461 U.S. 273, 282-286 (1983). After all, the manner in which one party typically opposes the claims of another party in a lawsuit is by litigating those claims on the merits in that lawsuit, not by bringing an independent action to prevent the claims from even being presented to the court in the first

place. In any event, the Attorney General's conduct of litigation to which the United States is a party, and the assistance rendered by other federal officials in that endeavor, are matters committed to agency discretion by law. 5 U.S.C. 701(a)(2); see *Swift & Co.* v. *United States*, 276 U.S. 311, 331-332 (1928); *Ponzi* v. *Fessenden*, 258 U.S. 254, 262 (1922); *United States* v. *San Jacinto Tin Co.*, 125 U.S. 273, 279 (1888); *Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1868). See also *Heckler* v. *Chaney*, 470 U.S. 821 (1985).

3. Petitioner also suggests (Pet. 21-23) that the judgment below has somehow abridged its sovereign immunity to suit. Because *this* action was brought by petitioner itself, petitioner's contention apparently is that the adjudication of its water rights in state court in *W-1* would be inconsistent with principles of tribal sovereign immunity. That argument has already been conclusively rejected by this Court. Petitioner may be immune from suit as a *party*, but the water rights held by the United States in trust for petitioner may nonetheless be adjudicated upon joinder of the United States, by virtue of the waiver of the United States' sovereign immunity under the McCarran Amendment. *Colorado River*, 424 U.S. at 809-813; *San Carlos Apache Tribe*, 463 U.S. 566 n.17. Petitioner's allegations of a conflict of interest do not disable the United States from submitting the reserved water rights for the Fort Apache Reservation in that litigation. Pet. App. 8c; see *Nevada* v. *United States*, 463 U.S. at 120. Indeed, petitioner seems to be urging the same position that was adopted by the court of appeals in *Northern Cheyenne Tribe* v. *Adsit*, 668 F.2d 1080, 1089-1090 (9th Cir. 1982), one of the decisions this Court reversed in *San Carlos Apache Tribe*.

4. It is now unmistakably clear that the Superior Court for Maricopa County in Arizona has jurisdiction in *W-1*, and that the United States therefore must present claims for the Fort Apache Reservation in that forum or risk forfeiting *all* water rights for the Reservation. As the court of appeals observed: "It is time that the Tribe accepted th[at] proposition as true." Pet. App. 6c.[4]

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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[4] Furthermore, the Court of Appeals for the District of Columbia Circuit rejected petitioner's essentially identical and equally baseless attempt to prevent the Attorney General from presenting claims in *W-1*. Under the doctrine of res judicata, that court's disposition independently forecloses petitioner's efforts here.

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